No. 1593.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMIL BIRCHER,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

GEO. W. MYERS,
WALSH & NOLAN,
Attorneys for Plaintiff in Error.

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I.

STATEMENT OF CASE.

By an indictment returned in December, 1907, it is alleged that certain described lands, comprising an area of 1920 acres, were on the 17th day of November, 1907, public lands within the state and district of Montana; and that Emil Bircher on that day

> "Did wrongfully and unlawfully, maintain and con-
> "trol, and cause to be maintained and controlled by
> "him, the said Emil Bircher, an inclosure of the said
> "lands consisting of a fence of posts and wires, which
> "said fence, then and there, inclosed all of the said
> "tract of land comprising an area of approximately
> "nineteen hundred and twenty acres of land, said
> "lands so inclosed as aforesaid being public lands of
> "the United States, and he, the said Emil Bircher,

"at the time of so maintaining and controlling said "fence and inclosure as aforesaid, has no claim or color "of title made or acquired in good faith, or an asserted "right to said lands by or under claim made in good "faith, or an asserted right to said lands by or under "claim made in good faith with a view to entry thereof "at the proper land office under the general laws of the "United States to said lands, or any part or parcel "thereof; contrary to the form of the statute in such "case made and provided, and against the peace and "dignity of the United States of America."

Record, page 3.

Upon a plea of not guilty,

Record, page 6,

the issues framed were tried by a jury, which returned a verdict of "guilty in manner and form as charged in the indictment."

Record, page 7.

Thereafter, a motion in arrest of judgment was interposed, upon the ground that the indictment did not state facts sufficient to constitute a public offense.

Record, page 7.

This motion was denied,

Record, page 8,

and a bill of exceptions was duly presented, allowed and filed, preserving the exception to the order of the court denying the motion in arrest of judgment.

Record, pages 12-15.

On the 21st day of March, 1908, judgment was pronounced and entered against Bircher, imposing a fine of $250, and sentencing him to confinement in jail for the term of twenty days.

Record, pages 12-15.

The plaintiff in error filed his assignment of errors,

Record, pages 16-17,

and with it his petition for a writ of error to this court,

Record, pages 18-19,

which was allowed,

Record, pages 19-20,

and a bond given as required in the order,

Record, pages 21-22,

and the case is regularly here on writ of error.

The question involved is whether or not the indictment states facts sufficient to constitute a public offense and that question is raised by the motion in arrest of judment, the bill of exceptions taken to the order denying the motion, and the assignment of errors.

II.

SPECIFICATION OF ERRORS.

The plaintiff in error specifies and relies upon the following error committed by the trial court, to-wit:

The court erred in denying defendant's motion in arrest of judgment.

III.

BRIEF OF ARGUMENT.

The contention of plaintiff in error is that the indictment is fatally defective in that it omits to charge therein an indispensable element clearly prescribed by the statute.

Omitting the parts which are irrelevant, the act of Feb-

ruary 25, 1885, under which the indictment was drawn, declares:

> "Section 1. That all inclosures of any public lands * * * heretofore or to be hereafter made, erected, or constructed by any person, * * * to any of which lands included within the inclosure the person * * * making or controlling the inclosure had no claim or color of title, made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States, at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such inclosure is hereby forbidden and prohibited."
>
> "Section 4. That any person violating any of the provisions hereof, * * * shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars and be imprisoned not exceeding one year for each offense."

It is obvious that to constitute the offense created and defined by this statute, the following elements must coexist:

First.—The land inclosed must be public land of the United States.

Second.—The person erecting or maintaining or controlling the inclosure must have had *"at the time any such inclosure * * * shall be made"* neither claim nor color of title made or acquired in good faith to the land, nor any asserted right thereto, by or under claim made in good faith, with a view to the entry thereof.

The only inclosure which is denounced as unlawful is the inclosure made by a person who *at the time the inclosure was made by him had* neither claim nor asserted right to the public lands included therein.

The words "such inclosure" used in "and the maintenance, erection, construction or control of any such inclosure is hereby forbidden and prohibited" have reference to and embrace only the inclosures defined as unlawful by the preceding part of the section.

To dwell upon this palpable meaning, or to endeavor to show that the words are not susceptible of any other interpretation would simply be needless. It will not do to say that the words "at the time any such inclosure was or shall be made" have reference to and qualify only the words "or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office, under the general laws of the United States." This would be to give the statute a meaning which it does not reveal and cannot bear Such a contention would not only be at war with the plain language of the first paragraph of Section 1, but would also destroy the effect of the emphatic word "had which just precedes any claim or color of title." "Had no claim * * * made in good faith or an asserted right thereto under claim made in good faith, with a view to entry thereof" * * * is limited and qualified by "at the time any such inclosure was or shall be made."

When must a defendant charged with maintaining an unlawful inclosure have had no claim or asserted right? There can be but one answer, and it is that he must have had no claim or asserted right at the time the inclosure was made. The indictment in this case charges the defendant with maintaining and controlling an inclosure

of public lands, "he * * * at the time of so maintaining and controlling said fence and inclosure as aforesaid has no claim or color of title made or acquired in good faith or an asserted right to said lands by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States to said lands."

There is neither statement nor recital that plaintiff in error *at the time the inclosure* was made, was without claim or asserted right. It is no answer to say that Congress must have intended to declare that which it has not declared, or to speculate or surmise as to its intention, or to assert that the spirit of the statute has been violated. A criminal case must be completely within all the words of the statute, and no criminal case can be brought by construction within the statute.

"If a case is fully within the mischief to be remedied, and is even of the same class, and within the same reason as other cases enumerated, still if not within the words, construction will not be permitted to bring it within the statute."

Bishop on Statutory Crime, Sec. 220.

Again:

> "A prisoner may defend himself by showing, if he can, that either the main part of the enactment or some clause put into it to create an exception, is so unguardedly worded as to open an escape for him through the letter, his act being still a complete violation of his spirit."
>
> Ib. 230.

See also Ib. Sections 80, 119, 218, 222, 224, 226, 227, 228, 232 and 340.

In

United States vs. Fox, 95 U. S. on page 672,

the court said:

> "It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so, and we cannot supply any qualifications which the legislature has failed to express."

In

United States vs. Harris, 177 U. S. 305,
44 L. Ed. 780,

the court said:

> "Giving all proper force to the contention of counsel for the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statute, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the class of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of statute,"

and then quoted with approval the following language of Chief Justice Marshall in the case of

United States vs. Wiltberger, 5 Wheat. 76;

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legisla-

tive, and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. * * * But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words,—especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other caes."

And the same court, in the case of

United States vs. Gooding, 12 Wheat. 460,
6 L. Ed. 699,

said:

"But it is sufficient to say, that the word 'such' has an appropriate sense, and can be reasonably referred to the ship or vessel previously spoken of; and such ship or vessel is not one merely built, fitted out, etc., but

one built, fitted out, etc. in a port or place within the United States. The whole description must be taken together. If we were to adopt any other construction, we should read the words as if 'such' were struck out, and the clause stood, 'any ship or vessel.' Such a course would not be defensible in construing a penal statute."

Declarations of like character will be found in the following cases:

Res Publica vs. Weidgle, 2 Dallas, 88, 1 L. Ed. 307;
Bolles vs. Outing Co., 175 U. S. 262;
Gardner vs. Collins, 2 Peters, 58-93;
Railway Co. vs. Phelps, 137 U. S. 536;
United States vs. Hartwell, 6 Wall. 395;
Baldwin vs. Franks, 120 U. S. 678;
United States vs. Reece, 92 U. S. 214;
Williamson vs. U. S., 207 U. S. 458.

In the case of

United States vs. Churchill, 101 Fed. 443,

the precise question now presented was determined adversely to the contention of the Government. Judge De Haven in that case said:

"The defendant is charged with unlawfully and knowingly maintaining a certain inclosure of public lands of the United States, in violation of section 1 of the act entitled 'An act to prevent unlawful occupancy of the public lands,' approved February 25, 1885 (23 Stat. 321). The indictment is fatally defective *in not charging at the time the alleged unlawful inclosure was made or erected* the defendant or other person who constructed the same had no claim or color of title to any of the public lands inclosed, 'made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the Untied States.' "

It is asserted, however, that the Government is remediless in cases such as the indictment specifies, unless by construction they are covered by the statute under consideration. This by no means follows. The Government is at liberty to proceed by a suit in equity, or by an action at law, to remove or abate nuisances consisting of inclosures of public lands, to which persons maintaining the inclosures were without color of title or claim at the time they maintained the inclosures.

United States vs. Ranch Co., 25 Fed. 465;
Ib. 26 Fed. 218;
United States vs. Cattle Co., 33 Fed. 323.

We respectfully submit that the acts charged are not within the provisions of the statute under which the indictment is framed, and, as charged, are insufficient to constitute the offense therein specified, and the motion in arrest should have been granted.

The judgment ought to be reversed with directions to sustain the motion and discharge the plaintiff in error.

Respectfully submitted,

GEO. W. MYERS,

WALSH & NOLAN,

Attorneys for Plaintiff in Error.